

Further Consultation Analysis and Response.

1. Introduction

1.1 In the Council’s Consultation Analysis and Response document published on 6 July 2020, we set out the main issues to have been raised during the consultation exercise that the council conducted together with our responses to those issues.

1.2 We invited respondents to respond to an additional question and suggest any alternative proposals that they may wish to make that would meet the legal requirement to allow new entrants into the city-centre market while causing less change for current traders.

“18.1.11 Respondents are invited to respond by Sunday 26 July with any alternative proposals that they may wish BCC to consider, which would allow for new entrants to enter the market for city centre and match-day street trading while making fewer or less significant changes to circumstances of current traders.

1.3 We received four responses:

- (i) from BSTA
- (ii) from a PhD student
- (iii) from two traders.

2.1 Alternative proposals

2.1.1 Respondents did not propose any alternative model to that proposed by the council, addressing the competing interests of new entrants and existing traders. The only alternative model that was suggested was essentially the continuation of the status quo.

2.1.2 The BSTA and other respondents agreed with the council’s suggestion (at 3.1.8) of supporting traders who are unable to remain in their existing location to move to another location including in the

Bullring Retail Markets. The BSTA also suggested that the council should consider measures to encourage prospective traders to the street trading community such as the development of markets (including the Bullring Market) and special events and occasional markets and street fairs.

2.2 Our Response

2.2.1 For the reasons set out in the council's previous consultation analysis, we do not consider the continuation of the status quo to be a tenable option. We shall respond to specific matters raised by respondents in more detail below.

2.2.2 We agree with the suggestion of developing additional capacity and locations in and around the city, including in the Bullring Markets. We do not, however, regard this by itself as a viable or sufficient response to the issues identified by the council, including legal requirements. We therefore continue to believe that changes must be made to the current street trading policy.

3. Other issues raised by Respondents

3.1 Although most of the issues raised by respondents were further arguments in relation to the proposed policy changes rather than alternative proposals, we shall respond to them briefly.

3.2 **Evidence Base** The BSTA suggested that the council takes a "very dim view" of the existing street trading offer and existing traders, and asked to see the evidence base upon which such conclusions were reached.

3.3 This characterisation of the council's views is not correct, but we do think that overall, the street trading offer requires improvement. These conclusions were supported by the consultants engaged by the council to report on street trading in 2011 and 2018. The reports of those reviews are in the public domain and may be found here https://www.birmingham.gov.uk/downloads/download/3644/birmingham_street_trading_review. The conclusion of both reports was that

the street trading offer, and the council's policy and enforcement approach needed to improve.

3.4 **The 1982 Act** BSTA presented a number of legal arguments as to why the council's proposed policy approach was not lawful. These included the suggestions that:

- (i) the council's proposals breach Reg.21(1)(e) of the 2009 Regulations by imposing an economic test; and
- (ii) that the proposal to limit the duration of a consent infringes the Services Directive 2006 and the 2009 regulations.

3.5 This is not the appropriate place to engage in a legal argument, but we do not agree with these points. The council is not proposing to introduce an economic test within the meaning of Reg.21(1)(e). In particular, we note that our proposals do not make the authorisation subject to any proof of demand, assessment of the economic effects of the activity or assessment of its appropriateness in relation to the council's economic planning objectives. Neither the BIS 2009 nor 2010 guidance suggests otherwise. We have also considered the BERR 2019 Guidance (which was withdrawn on 31 January 2020) and do not believe that this took these issues any further.

3.6 We do not agree that our proposals infringe the 2006 Directive or the 2009 Regulations. While limiting the duration of a consent can be contrary to the legislative requirements, this is not the case if there is an overriding reason relating to the public interest ("ORRPI"). In the specific case of street trading:

- (i) there is a statutory maximum period for a consent which has not been repealed;
- (ii) there is a limit to the number of city-centre (etc) consents that the council can grant;
- (iii) the Directive requires that it would be unlawful to operate a scheme that excluded or was dissuasive to new entrants to the market;
- (iv) we consider that granting consents which would be automatically renewed in perpetuity (or for which there would be a presumption of renewal in perpetuity) would infringe the requirement at (iii) above (see Reg.17, 2009 Regulations).

(v) according to the CJEU, an ORRPI can include issues of: public policy; public safety; public health; consumer and service recipient protection; protection of the urban environment and other social policy objectives.

3.7 The length of a consent is an issue of balance. In the light of the requirements of legislation, together with the needs of traders granted consents and those who cannot obtain access to the market due to the limited number of consents available, we have concluded that a consent with one presumption in favour of renewal was an appropriate balance to strike. This does not mean that a consent would not be renewed on subsequent occasions, but it seems to us that taking the duration provisions of the 1982 Act (which are still in force) together with the requirements of the 2006 Directive and 2009 Regulations (including Reg.17), our proposal represents the appropriate balance to strike. None of the respondents proposed a different balance other than a policy of indefinite renewal which for reasons we have set out before is not appropriate.

3.8 **Designation of Consent and Prohibited Streets** The BSTA made further submissions on this issue but these have not changed the council's position.

3.9 **Appeals** The BSTA made further submissions on appeals. The Council is introducing an appeal at the first round of applications. However, the policy will be reviewed in the first 12 months of operation and hence there will be opportunity to consider if an appeal at renewal or new application should be continued.

3.10 Any appeal at the implementation phase of the new policy will take the form of an independent review of the decision-making process and not a submission of new material by a trader.

3.11 We do not agree with the suggestion (at BSTA para.29[b]) that an appeal on the first application under the new policy would benefit only existing traders, as any new applicant which was unsuccessful would also be entitled to an appeal. Moreover, the introduction of a new policy carries with it an increased possibility of error in its

application which we believe justifies the introduction of an appeal process at that stage.

3.12 The council accepts that the refusal of a consent whether on renewal or on a first application made in a subsequent year is also an important issue for any trader, and we shall consider this issue carefully during the operation of the first 12 months of the policy

3.13 **Covid-19** The BSTA argued that the current Covid-19 pandemic means that the proposals should be put on hold. The council has taken steps as a result of the pandemic to support traders and will continue to do so. While it is not necessary to put the proposals on hold, the manner and timing of their implementation will be kept under review and traders will be kept informed.

4. Other responses

4.1 The traders also raised the issue of the duration of the consents. We have referred to this issue above.

4.2 **Trailer size** One trader suggested that design brief has specified trailer dimensions that may be inadequate for food traders.

4.3 **Our response** We have slightly increased the size of the unit/trailer in the design brief to accommodate an average standard sized food trailer. We shall consider this issue further. In principle, if a food trader could establish that (a) the design brief size requirements would be inadequate for the technical operation of their business which would otherwise be granted a consent and (b) that the location in question can support a larger unit, then the council will be willing to consider some small modifications of the design size requirements.

4.4 **Daily removal of trailers** The council considers it to be important that trailers are removed daily, for reasons previously set out. If there are issues with this requirement in specific locations, due to restricted road access, then these will be considered.

4.5 The final respondent (the PhD student) made a number of points, the most important of which concerned similar issues to those considered above, specifically relating to the issue of fairness of existing traders. These have been already been addressed above.